THE "BRAIN STORM," OR THE "IRRESISTIBLE IMPULSE" TEST, AS AFFECTING CRIMINAL RESPONSIBILITY, AND AS A SUBSTITUTE FOR THE "UNWRITTEN LAW" DEFENSE.

I.

The article by the Hon. T. W. Harrison, Judge of the Seventeenth Judicial Circuit of Virginia, published in the current May number of the VIRGINIA LAW REGISTER, evidences the extensive researches of the learned author and throws much light upon the consideration of the subject suggested in the caption.

II.

Such a subject has an especial interest for the legal profession. Several recent celebrated criminal cases have brought this subject into especial prominence before the public, but there is a detached, impersonal, professional standpoint from which it may, and, indeed, should, be regarded and examined by the profession.

III.

As Judge Harrison correctly points out, the "court must * * * proceed upon general principles"; and, aside from the method of dealing with the matter by legislative action (as to the wisdom or unwisdom of which the present writer expresses no opinion at this time), is it not of the utmost importance that these "general principles," upon which our courts are to proceed, should be defined with certainty; should be well understood; and should not be departed from in any case whatever? In other words, is it not of the utmost importance that ours should be in fact (what, in theory, it proudly boasts that it is), a government regulated by law—by fixed rules of human conduct?

IV.

Judge Harrison suggests that it is the inadequate penalties fixed by, and the "want of elasticity in the written statutes, that gives occasion for invoking the unwritten law." "An able and conscientious lawyer must find some basis," he says, "for an American jury to rest a verdict upon. Often, perhaps too often, this is done by the interposition of the plea of insanity."

But the vital question is, can the plea of insanity furnish a

basis "for an American jury to rest a verdict upon," unless the accused was in fact *insane* at the time of the alleged offense?

Manifestly, where insanity is not in fact present as an element in the case, instead of the plea of insanity furnishing a legal basis, it is a mere *pretext,* upon which a verdict may rest.

If a mere pretext, can our courts lend themselves as parties to the furnishing of such pretext? Can our juries be asked to base their verdict on such a pretext, or, indeed, on any pretext whatsoever?

To ask these questions is to answer them.

V.

Judge Harrison says that, "Bold indeed, however, would that attorney be, who relied upon the unwritten law as a defense. He would be met by the interposition of the court with adverse rulings and instructions. He would be met by the oath of the juror to follow the instructions of the court."

It would seem that even more bold would be the attorney who relied upon a plea of insanity as a defense in a case where there was no insanity present as an element therein. He might expect to be alike met by the adverse rulings and instructions of the court, and by the oath of the juror to follow the instructions of the court—with the added difficulty of the oath of the juror to "well and truly try and a true deliverance make between the Commonwealth and the prisoner at the bar, and a true verdict render *according to the evidence.*"

VI.

Our judges (certainly in Virginia), are, without exception, fearless, just and upright; our juries manly, honest, incorrupt and to be depended on to do the right as it is given them to see the right; and neither judge nor jury will be party to any pretext whatever, intentionally. But,

VII.

"To err is human."

Even the most able, fearless and upright judge, and the most honest and fearless jury, may be insensibly influenced by the very atmosphere, as it were, in the midst of a strong public sentiment against or in favor of the accused.

If the *unwritten law* is sustained by an overwhelming public sentiment in a community, so that it impels and sustains a verdict based thereon, it is recognized as a frank and fearless dissolution of the very bonds of society itself for the time being, and a reversion to the state anteceding the social compact, when "might made right." It finds its justification, if justification there be, in the instincts and impulses of primitive man, too powerful yet to be at all times controlled by the bonds of society.

Meanwhile, however, the progress of civilization; the restraints of religion; the dictates of reason and philosophy; the consequent increasing respect for law and order and the increasing realization of the importance of fixed rules of human conduct; are continually removing us farther and farther from the days of the "avenger of blood," and are making stronger and stronger the social bonds. Because there are yet occasions when such bonds are too feeble to restrain us from yielding to the primal instincts to right our own wrongs; shall we abrogate what has hitherto been considered a wise rule, that no man should be a judge and an executioner in his own behalf? If it was well for us to have striven and to have progressed so far in civilization; will it not be well for us to persist, and, perchance, make yet further progress?

Would it not be a retrograde step, in our efforts for social progress—a confession of failure—for any of our departments of government to admit that any "basis" * * * for a "jury to rest a verdict upon" is needed as *a substitute* for, or to take the place of, the "unwritten law"?—using the latter term in its well understood popular meaning. Again:

Such a substitute, if not a valid, *legal basis* for such verdict, would itself be but an *unwritten law*. Now then,—

VIII.

Is the plea of insanity a valid, legal substitute for the unwritten law defense?

Its nearest approach to it is through the "irresistible impulse" test, as applied to the plea of insanity.

Now insanity is a subject so intricate and so immense and beset with so many metaphysical and theoretical considerations, that the ablest mind may well become confused amidst its

labyrinthine ramifications. It might, therefore, indeed serve as a substitute for the unwritten law defense, with peculiar advantages in certain directions, if the well-settled legal bounds which have been set to the plea of insanity were departed from. As is well said by Brannon, J. (State *v.* Harrison, 36 W. Va. 713, cited by Judge Harrison):

"The infinite and intricate phases of the disorders of the mind are interesting, and their study necessary in that noble science which gives relief in the most distressing and saddest of human ailments, and which in our days, unlike the days of Shakespeare 'can minister to a mind diseased, pluck from the memory a rooted sorrow, raze out the written troubles of the brain.' But the law is not a metaphysical or theoretical science; it must follow principles suitable to the practical wants of men in organized society."

It behooves the courts, therefore, to be extremely watchful and guarded in giving instructions where the plea of insanity is interposed, lest, inadvertently, they depart from the well-settled legal bounds which have been set to this defense.

IX.

Judge Harrison gives an outline of the "right and wrong" test, and the "irresistible impulse" test; the former as applied to the plea of insanity in some states, and the latter in others. In this connection he says:

"It would seem that the following states have adopted the 'irresistible impulse' test: Alabama, Indiana, Ohio, Iowa, Kentucky, Tennessee, New Hampshire, Michigan, Connecticut, Montana, Illinois, Pennsylvania and perhaps other states.

"With the courts in the latter class are the distinguished text writers, Bishop and Wharton. Wharton Hom., p. 574; 1 Wharton Crim. Law, p. 44; 1 Wharton S. Med. Pr., p. 147; 1 Bishop Crim. Law. In this last class of cases must be placed Virginia."

Now let us see (so far as the present writer has had access to these authorities), what the courts, in the states mentioned by Judge Harrison, have decided and fixed, and what the text writers, referred to by Judge Harrison, lay down, as the legal bounds to the defense of the "brain storm" or "irresistible impulse." It is believed that the importance of the subject will justify this review of the decisions, although they are familiar to the profession.

X.

IN ALABAMA.

It is here held:

"There is a special mental disorder, a good deal discussed in modern treatises, sometimes called 'irresistible impulse,' 'moral insanity,' and by perhaps other names. If by these terms it is meant to affirm that a morbid state of the affections or passions, or an unsettling of the moral system, the mental faculties remaining meanwhile in a normal, sound condition, excuses acts otherwise criminal, we are not inclined to assent to the proposition." * * *

"We concur with Mr. Wharton (Hom., p. 574), that moral insanity, which consists of irresistible impulse, co-existing with mental sanity, 'has no support either in psychology or law.'" Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20, 25, 26.

"If it is true, as a matter of fact, that the *disease* of insanity can, in its action on the human brain through a shattered nervous organization, or in any other mode, so affect the mind as to subvert the freedom of the will, and thereby destroy the power of the victim to choose between the right and wrong, although he perceive it—by which we mean the power of volition to adhere in action to the right and abstain from the wrong —is such an one criminally responsible for an act done under the influence of such *controlling disease?*" (Italics the present writer's.) "We clearly think not." Parson *v.* State, 81 Ala. 577, 60 Am. Rep. 193, 199.

IN INDIANA.

It is here held:

"If the will power is not overthrown by *disease*" (italics the present writer's) "and there is sufficient mental capacity to know right from wrong, there is criminal responsibility." Note to State *v.* Harrison, 18 L. R. A. 229, citing Conway *v.* State, 118 Ind. 482.

On the trial of an indictment for murder, the court instructed the jury that, "frenzy arising solely from passions of anger and jealousy, no matter how furious, is not insanity." Held, correct. Guetig *v.* State, 66 Ind. 84, 32 Am. Rep. 99.

IN IOWA.

It is here held:

"If by the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be

definitely established to be true that there is an unsound condition of the mind, that is a *diseased* condition of the mind" (italics the present writer's), "in which though a person abstractly knows that a given act is wrong, he is yet by an *insane impulse*, that is an impulse proceeding from a *diseased intellect*, irresistibly driven to commit it, the law must modify its ancient doctrine, and recognize the truth, and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect." State *v.* Felter, 35 Iowa 68.

IN KENTUCKY.

It is here held:

"* * * before this species of insanity can be admitted to excuse the commission of crime, it must be shown to exist in such violence as to render it impossible for the party to do otherwise than yield to its promptings." Scott *v.* Com., 4 Met. (Ky.) 227, 83 Am. Dec. 461, 464.

IN NEW HAMPSHIRE.

It is here held:

"At the trial, when insanity is set up as a defense, two questions are presented. First. Had the prisoner a mental disease? Second. If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent? The first is purely a question of fact, that no one would think of disputing it any sooner than he would dispute that it was a question of fact whether a man has the consumption or not. It is in settling the second that all the difficulty arises."

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"The instructions given also imply that this is a mixed question of law and fact; that the only element of law which enters into it is that no man shall be held accountable, criminally, for an act which was the *offspring* and *product* of mental *disease.*" (Italics the present writer's.) "Of the soundness of this proposition there can be no doubt. Thus far are all agreed; the doctrine rests upon principles of reason, humanity and justice too firm and too deeply rooted to be shaken by any narrow rule that might be adopted on the subject. No argument is needed to show that to hold that a man may be punished for what is the *offspring of disease,* would be to hold that he may be punished for disease. Any rule that makes that possible cannot be law."

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"In view of these considerations, we are led to the conclusion

that the instruction given the jury in this case, that, 'If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be "not guilty by reason of insanity," if the killing was the *offspring or product* of mental *disease* in the defendant;' was right." State *v.* Jones, 50 New Hampshire 369, 9 Am. Rep. 242, 258, 264.

IN MICHIGAN.

It is here held:

"One who with no mental disorder, commits a criminal act from overmastering anger, jealousy or revenge, is responsible therefor." Note to 18 L. R. A. 228, citing, People *v.* Durfee, 62 Mich. 487, and other cases.

IN CONNECTICUT.

It is here held:

"To be a subject of punishment, one must have mind and capacity to judge of the nature and consequences of the act committed, that it is wrong and criminal, and will properly expose him to punishment, and he must not be overcome by an *irresistible impulse arising from disease.*" Note to 18 L. R. A. 229, citing State *v.* Johnson, 40 Conn. 136.

IN ILLINOIS.

It is here held:

"* * * we have come to the conclusion that a safe and reasonable test, in all such cases, would be, that whenever it should appear from the evidence that at the time of doing the act charged the prisoner was *not of sound mind*" (italics the present writer's) "but was *affected with insanity,* and *such affection* was the *efficient cause* of the act, and that he would not have done the act but for *that affection,* he ought to be acquitted. But this *unsoundness of mind,* or affection of insanity, must be of such a degree as *to create* an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them." Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231, 236.

IN PENNSYLVANIA.

It is here held:

"Moral insanity is not sufficient to constitute a defense unless it be shown that the propensities in question exist to such an extent as to subjugate the intellect, control the will, and render

it impossible for the person to do otherwise than yield thereto. No mere moral obliquity of perception will protect a person from punishment for his act." Com. *v.* Taylor, 109 Pa. 262.

IN TEXAS.

It is here held:

"Many objections are urged to the charge of the court upon the question of insanity, and it is urgently insisted that it was error to refuse defendant's special requested instructions upon the subject. The chief objection is that the court did not instruct the jury to the effect 'that defendant would not be responsible if he was overwhelmed by an impulse which took away his will power and rendered him incapable of controlling his actions.' In effect the complaint is that the court did not sufficiently charge upon moral insanity or irresistible and uncontrollable impulse as excuses for crime."

* * * * * * *

"Mr. Taylor, in his celebrated work on Medical Jurisprudence, speaking of moral insanity, says: 'The law does not recognize moral insanity as an independent state; hence, however perverted the affections, moral feelings or sentiments may be, a medical jurist must always look for some indications of disturbed reason.'"

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"The jury were instructed: 'A safe and reasonable test in all cases would be that whenever it should appear from all the evidence, that at the time of the doing the act, the prisoner was not of *sound mind*' (italics the present writer's), 'but was *affected with insanity,* and such affectation was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted. For in such a case reason would be at the time dethroned, and the power to exercise judgment would be wanting. But this *unsoundness of mind,* or *affection of insanity* must be of such a degree as to *create* an uncontrollable impulse to do the act charged, by overriding the reason and judgment and obliterating the sense of right and wrong, and depriving the accused of the power of choosing between right and wrong as to the particular act done.' This portion of the charge is a quotation from the opinion of Breese, J., in Hopps *v.* People, 31 Ill. 385. Again we copy from the charge:

" 'If it is true that the defendant took the life of deceased, and at the time the mental and physical machine had slipped from the control of defendant, or if some controlling mental or physical *disease* was in truth the acting power within him which he

could not resist, and he was impelled without intent, reason or purpose, he would not be accountable to the law. If on the other hand he was *of sound mind,* capable of reasoning and knowing the act he was committing to be unlawful and wrong, and knowing the consequences of the act, and had the mental power to resist and refrain from evil, his plea of insanity would not avail him as a defense.' And yet again the jury were told:

" 'But if the mind was in a *diseased and unsound state* to such a high degree that for the time being it overwhelmed the reason, conscience and judgment, and the defendant in committing the homicide acted from an irresistible and uncontrollable impulse, it would be the act of the body without the concurrence of the mind. In such a case there would be wanting the necessary ingredient of every crime—the intent and purpose to commit it.'

"We are of opinion that the charge upon the general doctrine of insanity was sufficiently full, and that it amply submitted the question of irresistible impulse and uncontrollable passion, at least as far as we are willing to go in that direction, and therefore there was no error in refusing the special requested instructions." Leache *v.* State, 22 Tex. Ct. App. 279, 58 Am. Rep. 638, 646.

IN VIRGINIA.

The precise question under consideration has not been decided by our court of last resort.

The Dejarnette Case, however, presently to be more particularly referred to, assumed, without question, the rule we have seen to be established in other states, with respect to the legal bounds of the defense of the "irresistible impulse," as being the rule in Virginia; and was concerned, indeed, with the secondary question of how far the *diseased* mind must be affected by *insanity* to exempt from responsibility to the law for crime.

The decisions in Virginia, however, are numerous (too numerous and the doctrine too well settled to permit of their citation here), to the effect that however great the excitement and impulse of passion, *of a sane person,* at the time of the commission of the act, it does not exempt him from responsibility to the law for the act, and can serve only to reduce the grade of the offense, under certain well-defined circumstances, to voluntary manslaughter.

THE TEXT WRITERS.

They lay down the rule as follows:

"If one allows his passions to be excited to a frenzy, * * * he is answerable to the criminal law for what he does in this condition. And the reason is that it is his duty to control his passions * * *. If he will not do it, he cannot complain when punished for the consequences. The case has no analogy to that of one upon whom the Almighty has laid His hand and taken away the *normal power of self-control.*" (Italics the present writer's.) I Bis. Cr. Law (8th Ed.), p. 238, § 387, subsec. 3.

"Irresistible impulse is not moral insanity, supposing moral insanity to consist of insanity of the moral system *co-existing with mental sanity.*" (Italics the present writer's.) "Moral insanity, as thus defined, has no support either in psychology or law. Nor is *irresistible impulse convertible* with *passionate propensity*, no matter how strong, in persons *not insane.* In other words, the *irresistible impulse* of *the lunatic*, which confers irresponsibility, is essentially distinct from the *passion*, however violent, of *the sane*, which does not confer irresponsibility." Wharton Hom., p. 574.

XI.

Without assailing the "irresistible impulse" test as a proper test to be adopted in Virginia, when applied to the defense of insanity, we see from the above-cited authorities that one of the legal bounds set to this defense, by unbroken authority, is that it can never be a legal, valid defense unless the mind of the accused, at the time of the commission of the offense, was in fact *diseased*—was by reason of disease not a normal mind—was not capable, as a normal mind would have been, of resisting the impulse.

XII.

Now it is true, the varieties of the "mind diseased"—the shades of difference between them, and the degrees in which the mind may be affected by disease—may be infinite; and it may be extremely difficult to determine the extent to which the power of volition may be affected by the disease. This, however, as pointed out in the New Hampshire decision above quoted, while *the* difficult question for determination, is aside from our present inquiry.

XIII.

What we are concerned with, for the present, is the first point referred to in the New Hampshire case, namely, that the irresistible impulse defense cannot be interposed unless the prisoner had in fact a mental *disease*.

XIV.

If this mental disease in fact controlled the volition of the accused, at the time of the act, it is a valid, legal defense—it would then constitute an irresistible impulse which would be a valid, legal defense.

XV.

It is also true, however, that jealousy, revenge, anger, may, at the moment of the act, constitute an *irresistible impulse*—as irresistible as an impulse proceeding from a diseased mind.

Nevertheless, there is no warrant in the decisions—in the law—or in legal principles, to confound the one with the other; to erect the latter into a legal defense because the first is such a defense.

XVI.

There is no difference between the present writer and Judge Harrison in this position, as shown by the concluding portion of his article. As he there states, "anger and passion sometimes overmasters the will." "Does not passion also becloud our moral perceptions and destroy our capacity to decide righteously," he exclaims. Again he says: "The insane impulse is distinguished from passion in this, that the one from a *disease of the mind*" (italics the present writer's) "supposes a lack of capacity to control; the other supposes the capacity but a failure to exercise the power. In the one case the ego has no will power to summon, in the other the ego has the will but refuses to call on it. Thus, too, the person at the time may not know the nature and quality of his act, but he is responsible if he has the capacity to know. Both the right and wrong test, and the test that superadds thereto the irresistible impulse, presuppose a *disease of the mind,* * * * which destroys the *capacity*. It is the duty of every one to exercise control, and if possessing power of control he allows his passions to domi-

nate him he is responsible. Such a person is in a very different category from the person whose mental machinery has slipped a cog, as Bishop expresses it, and who is hopelessly driven by an *insane impulse* which he has no capacity to control."

XVII.

It is therefore manifest that the *irresistible impulse* defense cannot be adopted as a *legal* substitute for the *unwritten law* defense. Yet,—

XVIII.

That its use might be unintentionally permitted as a substitute for the *unwritten law* defense is illustrated by what Judge Harrison has to say in his article, in comparing the Dejarnette Case with Instruction 20, Strother Case, referred to by him. In this connection Judge Harrison says:

"The Dejarnette Case.

"In the Dejarnette Case, 75 Va. 867, the lower court gave the following instruction:

" 'But in every case, although the accused may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences and has a knowledge that it is wrong and criminal, and a mental power to apply that knowledge to his own case, and to know that if he does the act he will do wrong, and receive punishment, *and possesses withal a will sufficient to restrain the impulse, that may arise from a diseased mind*, such partial insanity is not sufficient to exempt him from responsibility to the law for his crimes.'

"This instruction in its exact words in so far as the definition of criminal responsibility is given is expressed as follows (Instruction 20, Strother Case):

" 'An accused is responsible for crime, if he understands the nature and character of his act and its consequences, and has a knowledge that it is wrong and criminal and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, and *possess withal a will sufficient to restrain his impulses arising from mental derangement.*'

"Of this definition Judge Staples, speaking for the whole court, says:

" 'We think the rule here laid down is in accordance with the best authorities as well as the dictates of reason and justice.

"If the court had desired to adopt the 'right and wrong' test it would have omitted the words:

"'And possessed withal a will sufficient to restrain his impulses arising from mental derangement.'"

Here the words "mental derangement" are substituted for the words "a diseased mind" in the Dejarnette Case and Judge Harrison evidently treats the different phrases as identical in meaning. Yet, it is apparent, it is submitted, that they may have wholly different meanings. Indeed, although it is true that a secondary meaning of the word "derangement" is "disorder of the intellect; insanity"; the primary and popular meaning of the word is "the state of being deranged; a putting out of order; disturbance of regularity or regular course; disorder." (See Century Dictionary.) That is to say, the popular and primary meaning of the phrase "mental derangement" would be *any* mental disturbance or mental disorder. This would define and be applicable to the mental condition of an accused person who might interpose the *unwritten law* defense, whose mind might not be diseased, but normal and sane; whereas such an accused person, not having a diseased mind, could not interpose the *irresistible impulse* as a valid and legal defense.

One cannot escape the conviction that this use of the words "mental derangement" in lieu of the words "a diseased mind" are yet more open to objection and likely to mislead a jury, where the concluding words of the instruction in the Dejarnette Case—"such partial insanity," etc., or their equivalent, are omitted, as they were omitted from the instructions in the Strother Case. (See April Number, 1907, VIRGINIA LAW REGISTER.) With such words, or their equivalent, there would be terms used that would indicate to the jury that the mind of the accused must in fact be *diseased*—must be in fact *deranged by insanity*, before they can give the accused the benefit of the defense under consideration; and thus the words "mental derangement" would be more nearly confined to the significance of "disorder of the intellect; insanity," or "a diseased mind," to which, as we have seen, they should be limited according to unbroken authority and legal principles.

XIX.

It was reported in the public press that the plea of insanity—of the irresistible impulse, or brain storm—had no weight with or influence upon the jury in the Strother case. If so the instruction under consideration has as yet done no harm. It is submitted, however, with due deference, for the consideration of the Bench and Bar of Virginia, and for the further consideration of Judge Harrison also, that it would be best if the words "mental derangement" were not employed, in the connection above discussed, in instructions in the future, in cases where the plea of insanity may be interposed; and that it would be more in accord with precedent, legal principles and civil progress, if other terms were used conveying more definitely the proper meaning—what such proper meaning is all authorities being practically agreed in fixing as we have seen.

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